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Federal Regulatory Reform: An Overview

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Federal Regulatory Reform: An Overview

Summary

Federal regulation can be defined broadly as federal requirements, directives, standards, or procedures, backed by the use of penalties or other sanctions, intended specifically to modify the behavior of state and local governments, private institutions, businesses, and individuals. Congress and the President have made numerous attempts to reform government regulation over the last three decades. Regulatory reform efforts have centered on several policy issue areas that include requiring agencies to prepare cost-benefit and cost-effectiveness analyses for major regulations, centralizing mandatory review and clearance of new regulations, setting expiration dates on regulations (forcing a new review of a regulation before it is continued), and expanding the role of judicial review.

The heart of the debate over regulatory reform is the tension between the costs imposed by federal regulations, in terms of both dollars and government intrusiveness, and protecting public health, safety, and the environment. Several factors have made it troublesome to resolve regulatory issues and to pass comprehensive regulatory reform. The difficulty is compounded by the fact that cost-benefit analysis, cost-effectiveness analysis, and risk-assessment analysis, primary tools used by regulators, rely on subjective assumptions, incomplete data collection, and other uncertainties.

In its efforts to address regulatory issues, Congress has enacted laws to lessen the regulatory burden and intrusiveness of federal regulation. These laws include the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, the Small Business Regulatory Enforcement Fairness Act, and the Congressional Review Act, among others.

The purpose of this report is to provide Congress with an overview of regulatory reform efforts and a summary of regulatory issues. The report also briefly describes what issues have been most contentious and prevalent over the last decade or more, and what Presidents have attempted, on their own authority, to evaluate better both the necessity and the costs of regulations. Also discussed are laws passed by Congress that have a direct or indirect impact on the regulatory process, those that affect the analysis of the costs and benefits of regulations, and other laws that allow for congressional, executive, and judicial review of regulations.

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Introduction

Since the 1970s, Congress and the President have struggled to lessen the perceived intrusiveness and cost of federal regulations issued by over 100 federal agencies.[1] Federal regulation can be defined broadly as federal requirements, directives, standards, or procedures, backed by the use of penalties or other sanctions, intended specifically to modify the behavior of state and local governments, private institutions, businesses, and individuals. A significant increase during the last three decades in the number,[2] scope, and reach of federal regulations and regulatory programs has drawn criticism and stimulated much of the reform effort. On the other hand, those who perceive benefit from federal regulations are effective supporters. Regulations and agencies promulgating regulations relating to public health, safety, and the environment, the so-called "social" regulations and regulatory programs, while providing substantial protections, have also imposed a significant costs on the economy.

Regulatory reform efforts have required agencies to prepare cost-benefit and cost-effectiveness analyses for major regulations, centralized mandatory review and clearance of new regulations in the Office of Management and Budget (OMB), established termination dates for certain regulations and regulatory agencies, and expanded judicial review of regulations.

While Congress has not reached agreement on a single, comprehensive, regulatory reform bill, it has enacted several relevant measures, including the Paperwork Reduction Act,[3] the Regulatory Flexibility Act,[4] the Unfunded Mandates Reform Act,[5] the Small Business Regulatory Enforcement Fairness Act,[6] and the Congressional Review Act.[7] Congress has also passed legislation deregulating specific sectors of the economy previously regulated by government. For example,

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[1]Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* (Chicago: ABA Publishing, 1998).

[2]New and revised regulations have numbered, on average, around 1,600 per year for the last 20 years. Only 4% to 8% are new regulations, depending on the year specified. For additional information on this subject, see CRS Report RL30183, *Federal Regulations and the Federal Register: Statistical Measurements, 1976-1999*, by Rogelio Garcia.

[3]94 Stat. 2812; Dec. 11, 1980; recodified at 109 Stat. 163; 44 U.S.C. 3501 et seq.

[4]94 Stat. 1164; Sept. 19, 1980; 5 U.S.C. 601 note.

[5]109 Stat. 48; March 22, 1995; 2 U.S.C. 1501 et seq.

[6]110 Stat. 857; March 29, 1996; 5 U.S.C. 601 note.

[7]110 Stat. 868; March 29, 1996; 5 U.S.C. 801 et seq.

deregulation has occurred relating to telecommunications, transportation, and other industries.

Regulatory activity, whether within Congress, where bills are introduced each year calling for more or less regulation, or within the executive branch, where dozens of agencies propose, change, discontinue, or finalize regulations, may remain vigorous in the coming decades. In the absence of a consensus on a comprehensive regulatory reform bill, smaller scale reform efforts are likely to continue. Contending factions remain split, however, over the degree of risk a society should reasonably bear regarding health, safety, and environmental matters, as well as how best to determine and evaluate such risk.

This report provides a brief overview of regulatory reform efforts. It describes what issues have been most controversal and prevalent and what Presidents have attempted, on their own authority, to evaluate better the necessity and costs of regulations. Laws passed by Congress that have either a direct or an indirect impact on the regulatory process or allow for more formal analysis of costs and benefits of regulations, and those that require congressional, executive, and judicial review of regulations are also discussed.

Current Administrative Process

Federal agencies are authorized to issue regulations under their establishing statutes, as well as through statutes amending and extending the duties and responsibilities of those agencies. Many regulations are issued under the notice-and-comment requirements established by the Administrative Procedure Act (APA).[8] Passage of the APA in 1946 provided the framework within which agencies would perform administrative actions, including rulemaking.[9] The APA does not just apply to new rules, but applies to any changes or attempts to repeal or revise existing regulations. In a few instances, federal agencies are required to include elements of adjudicatory proceedings such as cross-examination and rebuttal witnesses to the notice-and-comment requirements when promulgating regulations. These agencies include the Federal Trade Commission, the Consumer Product Safety Commission, and the Occupational Safety and Health Administration. On occasion, agencies are required to conduct rulemaking exercises under formal adjudicatory proceedings.[10] Many of the general rulemaking requirements of the APA have been further defined by federal court rulings that have sought to make the rulemaking process more accessible to the public and more fair and meaningful to affected parties.

The notice-and-comment procedure of section 553 of the APA (often called "informal rulemaking") requires an agency to publish a notice of proposed rulemaking in the *Federal Register.* Publication in the *Federal Register* affords all interested

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[8]Lubbers, *A Guide to Federal Agency Rulemaking*, pp. 1-92.

[9]60 Stat. 237; June 11, 1946; 5 U.S.C. 551-559,701-706,1305, 3105, 3344, 5372, 7521.

[10]CRS Report RL30795, *General Management Laws: A Selective Compendium—107th Congress*, by Ron C. Moe, project coordinator, p. 9.

persons an opportunity to participate in the proceedings either by written comment or, at the agency's discretion, oral presentation. When consideration of the relevant matter is completed by the regulatory agency, these comments are incorporated into the final rule record. Also, final rules published in the *Federal Register* contain a detailed, comprehensive statement of the specific regulations' basis and purpose. A final rule normally must be published in the *Federal Register* at least 30 days before its effective date. Interested persons have the right to petition for the issuance, amendment, or repeal of a rule (see 5 U.S.C. 553). Under President Clinton's Executive Order 12866, a period for comment was established as not less than 60 days.[11] The APA itself does not specify the length of the public comment period. Executive Order 12866 also adds several other requirements to rulemaking not stipulated in the APA. The current Bush Administration has followed this Executive Order, and will for at least the immediate future.

Under Executive Order 12866, agencies can issue regulations only upon reasoned determinations of benefits and costs. All regulations must be submitted to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), and any major regulation (impact exceeding $100 million a year) submitted for review and clearance must be accompanied by a cost-benefit analysis. Agency regulatory plans must include risk assessment and analysis; agencies must submit to OMB plans to review existing regulations; and the Vice President and Regulatory Working Group will act as a forum to assist agencies in identifying and analyzing regulatory issues. During the promulgation process, regulatory agencies may extend or reopen the period for public comment at any time. Agencies are also free to grant additional procedural rights to interested persons.

The current administrator of the Office of Information and Regulatory Affairs, John D. Graham, has stated publicly that he is implementing a review policy that places greater emphasis on science-based procedures, including cost-benefit analyses, in evaluating proposed agency regulations.[12] OIRA will review all significant regulations for strict compliance with all procedures and guidelines to include risk assessment, peer review, and evaluation of rules for their impact on state, local, and Indian governments. Strict review will also be applied to regulations affecting energy supplies and small businesses. This action is a shift away from a prior emphasis on agency expertise in rulemaking decisions, and may portend a more active role for and dominance over regulations by OIRA.

Stricter review procedures at OIRA may affect agency rulemaking, making agencies more attentive to procedures and guidelines. Currently, agency rulemaking procedures may differ slightly, depending on the significance of a particular regulatory decision. Procedures may vary according to whether a rule is considered major or minor; whether it is a new rule, a revision, or a repeal of an existing regulation; or for many other reasons. Regardless, agencies are required to follow the requirements

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[11]U.S. President (Clinton), "Regulatory Planning and Review," Executive Order 12866, *Federal Register*, vol. 58, Sept. 30, 1993, p. 51735.

[12]U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, *Presidential Review of Agency Rulemaking by OIRA*, Memorandum for the President's Management Council (Washington: Sept. 20, 2001).

stipulated in the APA. Failure to do so could result in a challenge by OIRA or a reversal of the agencies' rulemaking by the court.

Regulatory Reform Concepts

Background

Regulatory reform has been a significant issue for both Presidents and Congress, due to the growing reach, scope, and numbers of regulations and regulatory programs issued over the last three decades.[13] Statutes have been enacted as reform measures, and several of them are discussed later in this report.

Most regulations have both economic and social effects. The purpose of economic regulation is to ensure the continuation of a competitive marketplace and to correct market failures when competition does not exist or does not allocate resources efficiently. Federal agencies such as the Federal Trade Commission or the Securities and Exchange Commission are examples of federal agencies that conduct economic regulation.

Regulations dealing with health, safety, and the environment, the so-called "social regulations," have been especially controversial. These social regulations, while providing substantial protections, have also imposed significant economic costs on business. Proponents of comprehensive regulatory reform contend that many federal regulations are too costly and intrusive. They argue that the public and private resources needed to address problems in health, safety, and environmental areas are limited, and that these resources must be allocated more efficiently to address the greatest needs of society in the most cost-effective manner, so that the costs of regulations do not exceed the benefits. Finally, they contend that the existing system tends to be overly risk conscious, and they question a perceived lack of stringent analytical guidelines in the methodology used to assess risk hazards as well as costs and benefits when developing regulations. These perceived shortcomings, they argue, result in unnecessary, costly, and intrusive rules that impede economic growth and development.

Supporters of health, safety, and environmental regulation believe that some of the reform efforts focus too much on costs and not enough on benefits. They argue that efforts to make the process more stringent hinder the ability of regulatory agencies to safeguard the public's health and safety and to protect the environment. Suggesting that a more complicated regulatory process might produce unintended negative consequences, they argue for retaining the current, relatively effective regulatory process to avoid these unforeseen consequences. They assert that the methodology and administrative process that agencies currently apply to rulemaking are adequate in evaluating the need for rulemaking and its costs and benefits. They argue that additional reforms might ultimately prevent or unnecessarily delay needed regulations as well as impose additional costs on agencies and risks to the public.

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[13]Marc Allen Eisner, *Regulatory Politics in Transition* (Baltimore: The Johns Hopkins University Press, 2000).

Several factors make it difficult to resolve differences regarding the need for regulatory reform. First, contending parties often disagree on the need for a particular regulation; some prefer a market solution. Second, the available information necessary for effective use of risk assessment, cost-benefit, and/or cost-effectiveness analysis (tools required for sound rulemaking) often is ambiguous and incomplete. Finally, these tools depend largely on assumptions and other subjective factors, thereby making them subject to bias and manipulation.

In recent years, efforts to reform the regulatory process have, for the most part, focused on the following 10 areas: (1) use of cost-benefit analysis and cost-effectiveness analysis when developing regulations, especially regulations likely to impose annual costs of $100 million or more; (2) use of risk-assessment analysis to determine the probability of certain hazards occurring and their adverse effects; (3) use of a regulatory budget to provide an overview of regulatory costs and set a cap on these costs; (4) subjecting new regulations to review and possible disapproval by Congress; (5) widening the scope of judicial review of regulatory actions; (6) imposing a moratorium on new regulations while agencies review their existing regulations to determine if they should be revised or abolished; (7) reducing and streamlining the paperwork required by regulations; (8) establishing a fair procedure for compensation of property owners when all or some of their property is "taken" or devalued by a regulatory action; (9) establishing a sunset mechanism whereby regulations or regulatory programs are terminated unless Congress or the agency determines otherwise; and (10) restricting mandates imposed on state and local governments unless federal funds are provided to offset the cost of these mandates. Each of these areas is briefly discussed below.

Cost-Benefit and Cost-Effectiveness Analyses

Cost-benefit analysis involves a systematic identification of all costs and benefits associated with a project, regulation, or policy decision, including a full analysis of how these costs and benefits are distributed across different groups in society. A full analysis recognizes that quantitative assessments of benefits and costs are necessarily uncertain and heavily dependent on numerous assumptions, thus requiring qualitative analysis. Particularly difficult to quantify are long-term or uncertain effects where suspected but subtle interactive aspects are not well understood or directly measurable. A regulatory requirement is judged to pass the test if the sum of future benefits outweighs the sum of present and future costs in present value terms. The analysis is extremely controversial when it seeks to rationalize inherent value trade-offs. Most observers believe that used carefully and with adequate data, cost-benefit analysis can be an effective tool for assessing regulatory costs.

Cost-effectiveness analysis seeks to determine how a given goal can be achieved at the least cost. In contrast to cost-benefit analysis, the concern is not with weighing the merits of the goal, but with identifying and analyzing the costs of alternatives to reach that goal. Cost-effectiveness analysis is commonly seen as a better tool than cost-benefit analysis for uncovering cases in which large incremental costs result in

minor gains. A disadvantage, however, is that misjudgments in determining the goal or the budget may go undetected.[14]

Risk Assessment

Risk assessment analysis is the systematic evaluation of the probability of certain hazards occurring and their adverse effects. There are many different methods of analyzing risks, some quantitative and some qualitative. The quality of the analysis depends on the adequacy of the underlying data and the validity of the methods. As with cost-effectiveness and cost-benefit analyses, risk analysis, carefully used and supported by adequate data, is a valuable management tool in developing and directing regulatory programs. Advocates state that risk analysis may be used as an objective, scientific basis for planning, identifying management strategies to provide "a bigger bang for the buck," or promoting risk reduction. Controversy focuses on how risk analysis should be used and how much influence it should have on health, safety, and environmental decisions. Critics argue that risk analysis is often not scientific and not entirely objective, in part, because of inadequate data regarding most chemicals, health effects, and ecological effects. The concern is that risk analysis may oversimplify problems and its conclusions can be easily manipulated. Risk analyses often focus on relatively small risks to the population as a whole, rather than larger risks to smaller groups. Cost-benefit analyses for environmental and health regulations may use quantitative estimates of risk to assess benefits (i.e., risks avoided), but quantitative analyses, critics claim, may undervalue such benefits, especially when projected over time. Critics further contend that comparative risk analysis is unscientific, and that priorities should not be based on risk alone.[15]

Regulatory Budget

There has been some discussion of a regulatory budget. Such a budget would be designed to improve regulatory accountability and control. Its purpose would be to force agencies to determine their regulatory priorities in two ways. First, the budget could impose an analytical framework to attempt an overview of the total costs and benefits of regulations. Second, the budget might limit the total volume of regulatory programs, expenditures, and compliance costs, by setting a cap on the compliance costs each agency could impose on regulated sectors of the economy, both private and public. While evoking some congressional interest, there are differing approaches to its appropriate range, contents, and objectives. Implementing a regulatory budget would present many conceptual and empirical problems. These include the scope of regulations to be covered (almost all federal programs involve some degree of regulation, the amount depending to some extent upon one's definition of "regulation"); cost estimates (direct and indirect, including the impact on firms, industries, and consumers, beyond compliance costs); benefit estimates

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[14]CRS Report RL30031, *Environmental Risk and Cost-Benefit Analysis: A Review of Proposed Legislative Mandates, 1993-1998*, by Linda-Jo Schierow.

[15]CRS Issue Brief IB94036, *The Role of Risk Analysis and Risk Management in Environmental Protection*, by Linda-Jo Schierow.

(generally regarded as more difficult to determine than estimating costs); and redundancy and/or overlap with state and local regulations.[16]

Congressional Review

Proponents of congressional review of regulations believe it better insures that Congress has an opportunity to reject unnecessary, overly intrusive, or excessively costly regulations. Congressional review, as enacted, requires agencies to send each of their final regulations to Congress and the General Accounting Office (GAO) for review before it takes effect. Implementation of the regulation may occur during the congressional review. Congress then has 60 legislative days to address the regulation. A regulation, whether or not it has become effective, can be rejected within the review period if Congress passes a joint resolution of disapproval and the President signs it, or if he vetoes the resolution and Congress overrides the veto. Congress can reject the regulation at any time during the 60-day period. If a Congress adjourns before the 60 days has ended, the 60 days to review is renewed for the next, incoming Congress. Congress has overturned one regulation since the passage of this Act in 1996.

Critics argue that congressional review encroaches on agency independence, can politicize rulemaking, delays the timely issuance of regulations, and requires an expertise in subject areas that Congress does not have readily available to it (one of the reasons Congress delegates regulatory authority to agencies in the first place). Proponents respond, however, that congressional review enables Congress (with whom the power to regulate constitutionally rests) to make the final decision on the need for specific regulations, and makes regulatory agencies more sensitive to congressional intent and Congress more accountable for regulators' actions.[17] (See Congressional Review Act, below.)

Judicial Review

Judicial review subjects agency actions to court scrutiny except where a statute precludes such review or "where agency action is committed to agency discretion by law." Any person adversely affected or aggrieved by an agency action "within the meaning of the relevant statute" may challenge that action. Statutes containing judicial review provisions applicable to rulemaking generally call for direct, pre-enforcement review in the courts of appeals and usually specify requirements as to venue, timing, and scope of review. Arguments over judicial review result from two primary concerns: first, the lack of such review may make agencies less accountable; and second, expanding judicial review may encourage frivolous court challenges and perhaps undermine the rulemaking process because of inadvertent errors, an inability to obtain hard data, and/or subjective evaluations of data by judges. Judicial review also helps insure that agencies follow proper regulatory procedures.

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[16]Samuel Hughes, "Regulatory Budgeting," Center for the Study of American Business, Washington University, Working Paper 160, June 1996.

[17]CRS Report RL30116, *Congressional Review of Agency Rulemaking: A Brief Overview and Assessment After Five Years*, by Morton Rosenberg, and CRS Report RL30795, *General Management Laws: A Selective Compendium—107th Congress*, by Ron C. Moe, project coordinator, p. 31.

Moratoriums on Regulations

Since 1981, there have been three moratoriums on regulations. Two of the moratoriums were issued by incoming Presidents Ronald Reagan and George W. Bush (1981 and 2001), both of whom wanted to review and possibly block regulations issued at the end of outgoing administrations. George H. W. Bush also issued a moratorium, but later in his presidency. All three moratoriums exempted regulations issued by independent regulatory boards and commissions, as well as regulations issued in response to emergency situations or statutory or judicial deadlines. Independent regulatory boards and commissions were exempted from the moratoriums, but were requested to participate in the review on a voluntary basis. Critics claim that moratoriums disrupt the regulatory process and delay the implementation of important regulations. Supporters, on the other hand, argue just the opposite, and assert that moratoriums help to block undesirable regulations and enable the new administration and federal agencies to revise or eliminate less desirable regulations. President George W. Bush's moratorium took effect on January 20, 2001, and ran for 60 days. Now expired, this moratorium was announced by issuance of a memorandum from the White House Office by Andrew H. Card, Jr., Assistant to the President and Chief of Staff.[18]

Under President George W. Bush's regulatory review plan (moratorium), federal regulatory agencies were ordered to stop sending proposed or final rules to the Office of the Federal Register for printing unless the rules had been reviewed and approved by a Bush appointee. Regulations already sent to the Office of the Federal Register, but as yet not printed, were returned to the issuing agencies. A regulation already printed and final had its effective date postponed for 60 days. These temporary actions postponed many regulations issued at the end of the Clinton Administration. Although the moratorium has expired, the future status of some regulations proposed or withdrawn is unclear. Many have been allowed to go forward; some have been dropped; and still others are under revision.

Paperwork Reduction

The growth in regulations has imposed significant paperwork burdens on individuals, businesses, and organizations—both large and small—and state and local governments. All generally agree on the need to reduce the amount of paperwork required to comply with regulations. Paperwork can consume numerous man-hours and imposes costs on those affected. Proponents of paperwork reduction argue that forms and reports required to be completed should be streamlined, simplified, and consolidated to avoid unnecessary and burdensome duplication. Other observers, however, argue that without adequate information from regulated entities or program beneficiaries, agencies may not be able to carry out their congressional mandates to monitor compliance effectively. The Office of Information and Regulatory Affairs in

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[18]U.S. White House Office, "Regulatory Review Plan," *Federal Register*, vol. 66, no. 16, Jan. 24, 2001, p. 7702.

OMB is the focus of the paperwork reduction effort because it controls the information collection activities of executive agencies.[19]

Private Property "Takings"

Much of the property rights debate is primarily centered on two statutes: the Endangered Species Act and the wetlands protection program under the Clean Water Act. Property rights activists have advocated two approaches. One calls for federal agencies to establish a procedure for assessing values if their proposed actions are likely to result in the "taking" of property under the Fifth Amendment of the Constitution. President Reagan adopted this approach in 1988 when he issued Executive Order 12630.[20] The other approach calls for a statutory dollar threshold to stipulate when a federal agency must compensate a property owner as a result of agency action resulting in a loss in property value. Typically, the statutory approach is far more generous to the property owner than the Fifth Amendment threshold, which in most cases requires a major diminution in property value before compensation is owed.[21]

Sunset of Regulations

Sunset is a mechanism designed to mandate a systematic reexamination of existing regulations to determine if they are still useful. One variant of sunset provides for agency review to determine if a regulation should be terminated. Another requires automatic termination unless the agency successfully argues otherwise. Sunset proponents believe that without an automatic review mechanism, regulations will continue long after they are viable. Critics agree that selected regulations should be reviewed periodically, but contend that automatic termination of thousands of regulations creates an enormous workload burden on understaffed and underfunded federal agencies, possibly interfering with an agency's ability to address new issues and regulatory requirements mandated by Congress.[22]

Unfunded Mandates

"Unfunded mandates" is a term used to describe responsibilities or duties imposed by the federal government on state and local governments without providing funding appropriate to the level of costs incurred. The issue touches upon the proper

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[19]CRS Report RL30590, *Paperwork Reduction Act Reauthorization and Government Information Management Issues*, by Harold Relyea, and CRS Report RL30795, *General Management Laws: A Selective Compendium—107th Congress*, by Ron C. Moe, project coordinator, p. 68.

[20]U.S. President (Reagan), "Governmental Actions and Interference with Constitutionally Protected Property Rights," Executive Order 12630, *Federal Register*, vol. 43, March 18, 1988, p. 8859.

[21]CRS Report RS20493, *Property Rights: House Judiciary Committee Reports H.R. 2372*, by Robert Meltz.

[22]CRS Report RL30795, *General Management Laws: A Selective Compendium—107th Congress*, by Ron C. Moe, project coordinator, p. 55.

role of federalism—the responsibility of the federal government to establish priorities and national standards—and the responsibility of state and local governments to determine their own priorities and standards. Advocates contend that mandates often are designed to address state and local problems found nationwide. State and local government officials, on the other hand, have expressed concern about the increasing cost of complying with federal mandates.[23] (See "Unfunded Mandates Reform Act," below.)

Negotiated Rulemaking

Negotiated rulemaking is a concept that emerged in the 1980s as a method to reduce the adversarial nature of rulemaking. In essence, agency rule makers negotiate the text and contents of a proposed regulation with interested and affected parties prior to drafting the regulation. If a consensus can be reached, it might make implementation of the regulation easier and it could lesson the likelihood of subsequent litigation. At worst, authorities state, the agency has a better understanding of the concerns of affected parties. Critics point out, however, that negotiated rulemaking works best on proposed regulations that are non-controversial in the first place. When a consensus is unlikely, requiring agencies to devote limited manpower and funds to this effort may distract from the agency's ability to perform its regulatory mission.[24] (See "Negotiated Rulemaking Act" below.)

Federal Efforts to Reform the Regulatory Process

During the last 30 years, both Presidents and Congress have struggled to lessen the number, intrusiveness, and cost of federal regulatory activity. Most of the effort has resulted in changes in the rulemaking process and other procedural changes, to better assure that agencies issue regulations only when necessary, and that regulations produce a net benefit at the lowest cost to society. These procedural changes have often been contentious and remain so today.

Presidential Efforts

Presidential efforts to reform regulatory procedures have generally been carried out through executive orders. Independent regulatory agencies are exempt (defined as such under (44 U.S.C. 3502 (10)). However, independent regulatory agencies can voluntarily comply. Presidents Richard M. Nixon, Gerard R. Ford, and Jimmy Carter all instructed federal agencies to include calculations of compliance costs and to consider alternatives to regulation in their regulatory activities when legally permitted.

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[23]CRS Report RS20058, *Unfunded Mandates Reform Act Summarized*, by Keith Bea and Richard S. Beth.

[24]CRS Report RL30795, *General Management Laws: A Selective Compendium—107th Congress*, by Ron C. Moe, project coordinator, p. 76.

President Ronald Reagan, however, initiated a more dramatic change in regulatory procedure with the issuance of Executive Order 12291.[25] E.O. 12291 directed agencies to employ cost-benefit analyses when developing regulations and established centralized review of agency rulemaking, two features that are now basic elements in the regulatory process. President Reagan's order also directed agencies, again to the extent legally permitted, to issue only regulations whose calculated benefits outweigh the costs. Agency compliance was insured by requirements for submitting both proposed and final regulations to OMB's Office of Information and Regulatory Affairs (OIRA) for review and clearance. The order further required that agencies continue to publish their semiannual agendas of proposed regulations (first required by President Carter). Regulations responding to emergency situations and regulations with statutory or judicial deadlines were exempted from review and clearance procedures, but still had to be submitted to OMB.

In 1989, concern about the continued costs of regulations led President George H. W. Bush to establish the President's Council on Competitiveness to review regulations issued by agencies.[26] Chaired by Vice President Dan Quayle, the council focused on reducing the financial burdens of new and existing regulations. In January 1992, the President imposed a 90-day moratorium on regulations and instructed agencies to identify existing regulations and programs imposing unnecessary regulatory burdens and to develop programs to reduce or eliminate those burdens. Regulations that were issued in response to emergency situations, had statutory or judicial deadlines, dealt with military or foreign affairs, or were related to agency administrative matters were exempted from the moratorium. The moratorium was extended, and remained in force until the end of the Bush Administration.

When President Bill Clinton assumed office in 1993, he also initiated several steps to reform the regulatory process. In September 1993, the President issued Executive Order 12866,[27] which revoked E.O. 12291 and E.O. 12498, but retained, with some modifications, the major provisions of these two orders, in particular, cost-benefit analysis and centralized review and clearance of regulations by OIRA. Independent regulatory boards and commissions again were exempted from the order (voluntary compliance with the order was possible). In addition to the executive order, President Clinton established the National Performance Review (NPR) in 1993, a task force headed by the Vice President. The NPR generated reports addressing and recommending improvements in the regulatory process.[28] Also in September 1993, the President ordered executive branch agencies to submit to OIRA within 90

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[25]U.S. President (Reagan), "Federal Regulation," Executive Order 12291, *Federal Register*, vol. 43, Feb. 17, 1981, p. 13193.

[26]U.S. President (Bush, G. H. W.), "Regulatory Planning Process," Executive Order 12498, *Federal Register*, vol. 50, Jan. 4, 1985, p. 1036.

[27]U.S. President (Clinton), "Regulatory Planning and Review," Executive Order 12866, *Federal Register*, vol. 58, Sept. 30, 1993, p. 51735.

[28]Office of the Vice President, *From Red Tape to Results, Creating a Government That Works Better and Costs Less, Improving Regulatory Systems*, Accompanying Report of the National Performance Review (Washington: GPO), Sept. 1993, p. 81.

days a list of regulations for which they planned to use negotiated rulemaking.[29] In April 1995, he directed agency heads to use their enforcement discretion to waive all or a portion of a penalty for regulatory violation to reduce compliance costs to small businesses.[30]

As mentioned earlier, upon taking office on January 20, 2001, President George W. Bush directed that no new or proposed regulations be published until reviewed and cleared by one of his appointees; that regulations sent to the Office of the Federal Register near the end of the Clinton Administration and not yet published be returned to the issuing agencies for review and approval; and that the effective date of regulations that had been published in final, but had not yet taken effect, be postponed for 60 days. Regulations issued by independent regulatory boards and commissions were exempted from the moratorium, as were regulations issued in response to health or safety emergencies and regulations under legislative or judicial mandates.[31]

Congressional Efforts

In the late 1970s and early 1980s, Congress relied, in part, on the legislative veto to overturn final regulations. Statutes applicable to several agencies and some programs were written to make final regulations subject to either a one-house or two-house veto before they could take effect. During this period, numerous bills were introduced to enact a generic legislative veto provision applicable to all regulations. This process was made invalid after the Supreme Court ruled the legislative veto unconstitutional, finding that it violated bicameralism and the "presentation" clause of the Constitution.[32]

A more direct approach taken by Congress was to deregulate previously regulated industries. Since the 1970s, Congress has passed several laws deregulating certain sectors of the economy. Areas of commerce that have been deregulated include banking and other financial services; telecommunications, to include cable and telephones; and areas relating to transportation, such as trucking and airlines. Deregulation also resulted in the elimination of the Civil Aeronautics Board and the Interstate Commerce Commission, although some of their programs were transferred to other agencies.

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[29]U.S. President (Clinton), "Negotiated Rulemaking," Memorandum of Sept. 30, 1993, *Code of Federal Regulations*, vol. 3, 1994, p. 776.

[30]U.S. President (Clinton), "Regulatory Reform-Waiver of Penalties and Reduction of Reports," Memorandum of April 21, 1995, *Code of Federal Regulations*. vol. 3, 1996, pp. 474-475.

[31]U.S. Executive Office of the President, "Memorandum for the Heads and Acting Heads of Executive Departments and Agencies," *Federal Register*, vol. 66, no. 16, Jan. 24, 2001, p. 7702.

[32]*INS v. Chadha*, 103 S. Ct. 2764, *Consumer Union, Inc. v. FTC* and *Consumer Energy Council of America v. FERC*, 103 St. 3556, and CRS Report RL30808, *Government at the Dawn of the 21st Century: A Status Report*, by Harold C. Relyea, p. 36.

In 1995, the House of Representatives, with the passage of H.Res. 168 (104th Congress), changed its rules to enable the House to repeal regulations. This resolution allows bills that would overturn regulations and that have been reported favorably from a committee to be placed on the "Corrections Calendar" on the second and fourth Tuesday of each month. A three-fifths vote of the House is required to pass corrections legislation.[33] The Senate does not have such a procedure.

Congress has also considered numerous other proposals that would directly affect the administrative processes of all government agencies, including regulatory agencies. Several laws have been enacted that have had a significant impact on government–wide regulatory policy. The most far-reaching of these laws are noted below.

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612), since amended, directs agencies to prepare analyses indicating how agency regulations affect smaller entities, including businesses, organizations, and state and local governments. The Act encourages an agency to tailor regulations so that they are less burdensome to smaller entities. Copies of the agency analyses are to be sent for review and comment to the Office of Advocacy in the Small Business Administration. The Act also requires agencies to publish semi-annual regulatory agendas describing regulatory actions they are developing. Amendments that were part of the Small Business Act in 1996, discussed below, have strengthened the Regulatory Flexibility Act.[34]

Negotiated Rulemaking Act. The Negotiated Rulemaking Act of 1990 (5 U.S.C. 561-570a), as amended and permanently authorized in 1996 (110 Stat. 3870), seeks to overcome the perceived adversarial relationship between agencies and affected interest groups that sometimes accompanies agency rulemaking. The Act encourages agencies to consider convening a negotiated rulemaking committee that includes private parties with an interest in the rule before developing and/or issuing a proposed regulation under the Administrative Procedure Act (APA). The agency would then issue the agreed upon proposal as a proposed or final rule if an acceptable consensus can be reached .[35]

Paperwork Reduction Act. The Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520), since amended, seeks to minimize the cost and burden imposed by federal paperwork requirements and to maximize the usefulness of the information collected. It established the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget, making OIRA responsible for reviewing and clearing agency information collection requirements. Through E.O.

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[33]U.S. Congress, House Committee on Rules, *Establishing a "Corrections Calendar" in the House of Representatives*, report to accompany H.Res. 168, 104th Cong., 1st sess., H.Rept. 104-144 (Washington: GPO, 1995), and see also CRS Report 97-301, *The House's Corrections Calendar*, by Walter J. Oleszek.

[34]CRS Report RL30795, *General Management Laws: A Selective Compendium—107th Congress*, by Ron. C. Moe, project coordinator, p. 73.

[35]Ibid., p. 76.

12291, OIRA also became the central clearinghouse for agency rulemaking actions. Agencies are required to create an office responsible for ensuring compliance with information policies and information resources management.[36]

Unfunded Mandates Reform Act. The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 602) was one of several major regulatory reform measures passed by the 104th Congress, although the law applies to nonregulatory agencies as well. The Act requires agencies to prepare a cost-benefit analysis and other assessment measures before issuing (1) any general notice of proposed rulemaking likely to have a federal requirement resulting in state and local expenditures of $100 million or more in any single year, and (2) any final rule for which a general notice of proposed rulemaking was published. The Act does not apply to independent regulatory boards and commissions. The required assessments must include the extent to which costs to state, local, and tribal governments may be paid with federal funds. When developing regulations under the Act, agencies must consider reasonable alternatives and select the least costly, most cost-effective, or least burdensome of the alternatives, or explain in their written assessment records why such alternatives were not chosen. The assessments would be published in the *Federal Register*, along with proposed rules. The Act also allows for judicial review, but only to redress agency failures to prepare written statements and analyses accompanying regulations.[37]

Small Business Regulatory Enforcement Fairness Act. Title II of the Contract with America Advancement Act of 1996 is the Small Business Regulatory Enforcement Fairness Act,[38] which incorporates several regulatory reform proposals under various subtitles.

Regulatory Compliance Simplification. (Subtitle A)[39] Requires agencies issuing regulations and the Small Business Administration to give small businesses active assistance in understanding and complying with these regulations.

Regulatory Enforcement Reforms. (Subtitle B)[40] Creates a Small Business and Agriculture Regulatory Enforcement Ombudsman and Regional Small Business Regulatory Fairness Boards to assist small businesses. In certain circumstances, it allows for reducing or waiving civil penalties for violations of statutory or regulatory requirements.

Equal Access to Justice Act Amendments. (Subtitle C)[41] Awards attorney fees and court costs to private parties, including large entities, if a court finds an agency's adversary adjudication claims in a hearing substantially in excess of the

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[36]Ibid., p. 68.

[37]CRS Report RS20058, *Unfunded Mandates Reform Act Summarized*, by Keith Bea and Richard S. Beth.

[38]P.L. 104-121; March 29, 1996; 110 stat. 847, at 857-874.

[39]110 Stat. 858; 5 U.S.C. 601, note.

[40]110 Stat. 860; 5 U.S.C. 601, note and 15 U.S.C. 657.

[41]110 Stat. 862; 5 U.S.C. 504 and 28 U.S.C. 2412 (d).

decision of the adjudicative officer, as well as unreasonable when compared with other such decisions.

Regulatory Flexibility Act Amendments. (Subtitle D)[42] Amends the Regulatory Flexibility Act of 1980 by removing the prohibition on judicial review of an agency's decision to provide or not provide a regulatory flexibility analysis. Federal courts may now order corrective action regarding such an analysis, and defer enforcement of a rule if they find the analysis defective. Agencies also are required to send a proposed rule and copy of an initial regulatory flexibility analysis, or a determination that such an analysis is not required, to the Small Business Administration (SBA) for comment. In addition, a review panel consisting of officials from the issuing agency, the Office of Information and Regulatory Affairs (OIRA), the SBA's Chief Counsel for Advocacy (small businessman's advocate), and another representative of SBA are to consider the impact on small business of regulations issued by the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA).

Congressional Review Act. (Subtitle E)[43] Requires agencies to submit new regulations to Congress and the General Accounting Office (GAO) before the regulations can take effect. GAO is required to prepare a report on each major rule (over $100 million impact), which it sends on to Congress, to assure that the agency has complied with procedural requirements regarding cost-benefit analysis, regulatory flexibility analysis, and specified sections of the Unfunded Mandates Reform Act. Congress has 60 session days in which to block the regulation by passing a joint resolution of disapproval, which must be signed by the President. The regulation goes into effect if the President vetoes the joint resolution and Congress overturns the veto.

Omnibus Consolidated Appropriations Act. The Omnibus Consolidated Appropriations Act of 1997 (110 Stat. 3009) Title II, section 645, requires the Office of Management and Budget to submit to Congress a report estimating the costs and benefits of all federal regulations and regulatory programs. The OMB report to Congress must analyze the direct and indirect impact of regulations on the private sector and state, local, and federal governments, and must recommend regulations that should be revised or eliminated. Riders to appropriations acts have been used by Congress, over the last several years, to require OMB to submit annual reports on the costs and benefits of federal regulations, and to instruct OMB to issue guidelines to agencies that would have the effect of standardizing the procedures to measure the costs and benefits of regulations and the forms for accounting statements.

Truth in Regulating Act. The Truth in Regulating Act of 2000 (114 Stat. 1248-1250) requires GAO to evaluate independently the cost-benefit analysis prepared by agencies when they develop a regulation. When an agency publishes an economically significant rule, whether proposed or final (including interim rules), a chairman or ranking member of a congressional committee of jurisdiction of either House may request GAO to review and report on the rule within 180 days. An

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[42]110 Stat. 862; 5 U.S.C. 603, 605, 609 and 611.

[43]Title II, Subtitle E of P.L. 104-121; March. 29, 1996; 110 Stat. 868; 5 U.S.C. 801-808.

economically significant rule is defined as any rule having an annual effect on the economy of $100 million or more per year, or adversely affecting in a material way the economy, a sector of the economy, or other specified sectors. GAO's review program has not taken effect, because funding has not yet been appropriated.

The GAO report is to include an independent evaluation of the agency's analysis of potential benefits and costs, or other analysis required, and any alternative approaches considered in the rulemaking, as well as a summary of the results and their implications. GAO is to evaluate the agency's data, methodology, and assumptions used in developing the rule; to explain how any strengths or weaknesses in the data, methodology, or assumptions support or detract from conclusions reached by the agency; and to discuss the implications of any weaknesses. The program is authorized for three years, beginning in 2001, and the Comptroller General is to recommend to Congress whether it should be made permanent. As mentioned above, the review program has not taken effect, because funding has not yet been approved by Congress.

Conclusion

Regulatory activity, responding to changing conditions in American society, remains vigorous. Congress and the President continue their efforts to mitigate the perceived intrusiveness and cost of this activity, while providing protections to the public. In the absence of a consensus on a comprehensive regulatory reform bill, smaller scale efforts are likely to continue. Contending factions remain split, however, over the degree of risk a society should reasonably tolerate regarding health, safety, and environmental matters, as well as how best to determine and evaluate such risk.

For Additional Reading

CRS Issue Brief

CRS Issue Brief IB94036, *The Role of Risk Analysis and Risk Management in Environmental Protection*, by Linda-Jo Schierow.

CRS Reports

CRS Report RL30116, *Congressional Review of Agency Rulemaking: A Brief Overview and Assessment After Five Years*, by Morton Rosenberg.

CRS Report RL30031, *Environmental Risk and Cost-Benefit Analysis: A Review of Proposed Legislative Mandates, 1993-1998*, by Linda-Jo Schierow.

CRS Report RL30183, *Federal Regulations and the Federal Register: Statistical Measurements, 1976-1999*, by Rogelio Garcia.

CRS Report RL30795, *General Management Laws: A Selective Compendium—107th Congress*, by Ron C. Moe, project coordinator.

CRS Report RL30590, *Paperwork Reduction Act Reauthorization and Government Information Management Issues*, by Harold Relyea.

CRS Report RS20058, *Unfunded Mandates Reform Act Summarized*, by Keith Bea and Richard S. Beth.

Other Readings

Jeffrey S. Lubbers, ed., *Developments in Administrative Law and Regulatory Practice* (Chicago: American Bar Association, 2001), 535p.

A Guide to Federal Agency Rulemaking (Chicago: American Bar Association, 1998), 443p.

Selected World Wide Web Sites

Information regarding current and past regulatory policies and administrative procedures is available at the following Web sites.

AEI-Brookings Joint Center for Regulatory Studies
[http://www.aei.brookings.org]

Center for Regulatory Effectiveness
[http://www.thecre.com]

Competitive Enterprise Institute
[http://www.cei.org]

General Accounting Office (GAO)
[http://www.gao.gov]

Government Printing Office (GPO)
[http://www.access.gpo.gov/nara]

Heritage Foundation
[http://www.regulation.org]